

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	4:03CR3162
)	
v.)	
)	
RIGOBERTO ISLAS,)	ORDER
)	
Defendant.)	
_____)	

On May 23, 2007, this Court filed a memorandum opinion (Filing No. 64) and order and judgment (Filing No. 65) denying defendant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Filing No. 56). Before the Court is a notice of appeal (Filing No. 68) which was filed on July 27, 2007, together with an application to proceed *in forma pauperis* on appeal (Filing No. 70).

In the notice of appeal, defendant alleges that he deposited the notice of appeal "in Bastrop Federal Correctional Institution internal mail system" on May 23, 2007, together with proper postage, and is therefore timely under the prisoner mail box rule. See *Houston v. Lack*, 487 U.S. 266 (1988).

The Court is skeptical that this filing was delivered to the institution on May 23, 2007, as the records of this Court reflect that copies of the opinion and judgment were mailed to him on May 23, 2007. However, the Court will treat the notice as an application for extension of time, find that it was timely

filed, and as a result, the notice of appeal will be deemed timely filed. The Court finds that the defendant qualifies to proceed *in forma pauperis* and his application will be granted.

Before defendant's appeal can progress, however, 28 U.S.C. § 2253(c) provides that either a circuit justice or judge must issue a certificate of appealability. A certificate of appealability may be issued only if the Court finds that the appellant has made a substantial showing of the denial of a constitutional right. The Court finds that such a showing has not been made and no certificate of appealability will be issued. Accordingly,

IT IS ORDERED:

1) Defendant's notice of appeal is deemed timely filed.
2) Defendant's application to proceed *in forma pauperis* is granted.

3) No certificate of appealability will be issued.

DATED this 14th day of August, 2007.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court